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IN THE

Supreme Court of the United States

October Term 1956
No. 150

COLGATE-PALMOLIVE COMPANY, STALFORT PRESSURE-PAK CORPORATION, JOHN C. STALFORT & SONS, INC., and READ DRUG & CHEMICAL COMPANY, INC.,

Petitioners,

—v.—

CARTER PRODUCTS, INC., JOSEPH G. SPITZER, and MARVIN SMALL,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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Petitioners pray that this Court grant a rehearing of its order of October 8, 1956 denying their petition for a writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit, as prayed for in the petition filed June 8, 1956.

This petition for rehearing advances grounds for granting certiorari not presented in the original petition which are of particular importance to petitioners Stalfort Pressure-Pak Corporation and John C. Stalfort & Sons, Inc.

The two Stalfort companies (herein called "Stalfort") constitute a small independent commercial filler engaged in the business of pressure packaging products of others for a fee (Rec. 795-6, 2486 *et seq.*, not printed).

The grounds for seeking a rehearing in the particular interest of Stalfort are three:

1. The large public importance to the business of commercial filling of the decisions below according plaintiffs an undeserved monopoly upon the pressure packaging of soap.

2. The prejudice to Stalfort and other commercial fillers from refusing to admit the know-how of commercial fillers as prior art against the Spitzer patent.

3. The prejudice to Stalfort arising from the Court of Appeals' refusal to review the issue of infringement.

Importance to the Commercial Filling Industry

The industry of commercial filling has watched with concern the progress of this case through the courts.

That industry is composed of some fifty or more small independent business concerns, such as Stalfort, which make their livelihood by packaging the products of others for sales to consumers. Stalfort which is typical has total assets of $1,065,000, a net worth of $614,000 and does an annual pressure packaging business of $2,094,000 per year.

Commercial fillers have naturally been greatly affected by the enormous growth in public acceptance of pressure packaging which followed the widespread use of aerosol insecticides by the armed forces during World War II.

Foods, insecticides, cosmetics, soaps, disinfectants, paints, lacquers and a host of edible and inedible domestic and industrial products are susceptible of pressure packaging. An ever-increasing number of these products, ranging from foaming shoe cleaner to Christmas tree snow, are now so packaged and dispensed.

The potential of this business is undoubtedly many times the thirty million dollars of pressurized shaving soap now sold annually.

This case, which involves the first significant patent litigation in the field of pressure packaging, is the bellwether of the patent future of the pressure packaging industry.

Effect of the Decisions Below Upon Stalfort

To the small independent business firms composing the pressure packaging industry, the situation of petitioner Stalfort provides an alarming case history.

The acts of Stalfort which constituted the infringement were the performance of a standard pressure packaging operation for The Mennen Company.

Stalfort took a soap solution supplied to it by Mennen, packaged it with conventional pressure packaging equipment in standard beer can containers with standard valves, using conventional proportions of the trademarked Freon propellants of DuPont (App. 144, 146-7).

Stalfort received no protection from the company whose products it packaged. The entire packaging operation and its end product was so much a part of the standard know-how of commercial fillers that Stalfort gave Mennen an indemnity that the product so produced did not involve the patent rights of others.

While Stalfort was engaged in this packaging operation, the Spitzer patent issued with 21 claims covering virtually all practical combinations of soap solutions with conventional Freon propellants. The claims are not limited to shaving lather but, as the specifications show, cover any such product giving a "shaving, shampooing or washing lather" which can "be directly applied to the skin, hair

or other part or material in lather form." (PX 39, App. 674, c. 1, l. 53 *et seq.*)

If the decisions below are permitted to become final by this Court, Stalfort will be effectively prohibited during the lifetime of the Spitzer patent from any substantial participation in the pressure packaging of soap with Freon propellants.

The basis upon which plaintiffs assert this broad monopoly against the pressure packaging industry is that they mixed common barber shop liquid shaving soap with the most common commercial Freon propellants in conventional pressure containers (Pet. 10-13).

The effort advanced by the plaintiffs in justification for this broad monopoly was accomplished in 13 working days without the benefit of the know-how which is any commercial filler's stock-in-trade (PX 5, not printed).

Effect on Commercial Fillers Generally

The most obvious impact of the decisions below upon the industry of commercial filling is that commercial fillers can no longer undertake most conventional pressure packaging tasks with respect to soap products unless tribute is paid to the plaintiffs.

The small concerns which compose the commercial filling industry cannot sustain the burden of extensive patent litigation. They must either accept the presumptive validity of the patent and stay out of the field or pay license fees to the plaintiffs.

The full implications of the decisions below are, however, much more far-reaching. They establish for the very production problems with which the industry is concerned an extraordinarily low standard of invention.

They provide ample justification to the Patent Office to permit the issuance of new patents whenever a different product is pressure packaged in a can. Indeed, the members of the industry are well aware that the race to the Patent Office to prosecute such applications is already well under way.

Such a "proliferation of patents" in a growing industry will have intolerable consequences. Most of these patents, which should be invalidated out of hand, will not come to the attention of the courts.

No industry can afford to litigate itself out of the enmeshment resulting from a multiplication of undeserved and unjustified patent monopolies. The members of this industry will be forced to solve their problems by according respect to paper patents.

This Court, which is quick to perceive problems arising from the co-existence of patent monopolies and the policies of the antitrust cases, should not by default establish the climate in which these problems must inevitably grow.

Seldom has a patent case been presented to this Court so fraught with significance to an entire industry.

Refusal to Receive Pressure Packaging Art in Evidence

The most serious error committed by the courts below was their refusal to permit Stalfort to contest validity by proving the know-how and general knowledge of the pressure packaging industry.

Naturally pressure packers had accumulated a large store of information as to containers, valves, propellants and proportion of ingredients in the performance of their normal business operations. The problems of pressure

packaging any one product are, in many respects, common to the pressure packaging of all.

It would seem obvious that such know-how and general knowledge of the commercial filling industry was pertinent in determining whether the pressure packaging of soap required inventive effort.

Stalfort and the other defendants endeavored to develop this information at the outset of their case through Dr. Fulton, a Government expert from the Bureau of Entomology (App. 148 *et seq.*). Dr. Fulton was intimately acquainted with the first widespread use of pressure packaging for insecticides (App. 149-51). He had followed the progress of pressure packaging of other products as a member of an advisory board of the Interstate Commerce Commission which passed upon such products from the standpoint of safety (App. 149).

At this point the trial court, on its own motion, issued a blanket ruling prohibiting the introduction of evidence as to the general knowledge of the art of pressure packaging "because to me it is just befuddling the issue" (App. 155).

As a result, the validity of the claims of the Spitzer patent has been appraised in a vacuum without reference to the state of the very art out of which the patent was born.

It is hard to conceive of a method of determining the validity of broad claims preempting the field of pressure packaging soap more prejudicial to the industry whose general progress made this innovation possible.

Refusal to Review Issue of Infringement

In the original petition we pointed out that the Court of Appeals rejected the trial court's finding that the invention of the patent was the mixing of a specific group of Freon propellants with aqueous soap solutions (Pet. 13-15).

We showed that the Court of Appeals found instead that the invention consisted of a specific combination of specific soaps with particular propellants in specific proportions (Pet. 14).

We pointed out that this revision of the trial court's finding of invention permitted the Court of Appeals to avoid the impact of the *Mandel* and *Sinclair* decisions* of this Court and the problem of the prior use of Segelken (Pet. 22-5).

One question which the Court of Appeals should not, however, have avoided was that of infringement. In narrowing the definition of the invention, the Court of Appeals necessarily substantially narrowed the permissible scope of the claims. The Court of Appeals was therefore obliged to examine the effect of its redefinition of the invention upon the question of infringement.

Actually none of the products in suit of any of the defendants conformed to the Court of Appeals' description of what the patentees invented. The Court of Appeals' definition of the invention appears in the following passage from its opinion:

> "Finally, after much experimentation, sodium soaps were eliminated and the soap solution adopted was a combination of 80 parts of TEA (triethanolamine)

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* *Mandel Bros.* v. *Wallace*, 335 U. S. 291, 295 (1948), and *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, 335 (1945).

> stearate and 20 parts of TEA cocoate, to prevent jelling. The proper propellant was found after much inquiry and experiment by mixing Freon-114 (1, 2 dichlor 1, 1, 2, 2 tetrafluorethane) with Freon-12" (Pet. 5a).

Actually the composition so described is specified in but a single claim of the patent, Claim 21—the only claim of the patent which is limited to any specific composition (PX 39, App. 674, c. 14, l. 31). This claim was never asserted to be nor found to be infringed.

Instead of reevaluating the issue of infringement in the light of its new definition of the invention, the Court of Appeals completely read the issue of infringement out of the case.

It treated the issue as if infringement were conceded by the defendants. The Court of Appeals stated:

> "Defendants admitted infringement if these claims were valid but denied their validity and asked judgment declaring them as well as all other claims of the patent invalid" (Pet. 12a).

Actually it was only defendant Colgate that entered into any stipulation with respect to infringement. That Company stipulated that the products produced by them were within the literal scope of certain of the claims. Neither Stalfort nor Read Drug & Chemical Company, Inc. made any concession with respect to infringement whatsoever (Rec. 2500 *et seq.*, not printed).

The failure of the Court of Appeals to reappraise the issue of infringement in the light of its revised views as to the invention was prejudicial error of the most serious kind.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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October 30, 1956

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

October 29, 1956

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